IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: O R D E R :

S.B. Criminal Revision Petition . No.471/2007.
(Smt. Manju Vs. State of Rajasthan & Others)

DATE OF ORDER : August 22, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. Anil Kaviraj for petitioner.
Mr. Vishnu Kachchhawah, P.P. for the State.
Mr. Sandeep Mehta for the respondents.

BY THE COURT :

Heard learned counsel for the parties.

This petition has been filed by complainant Smt. Manju seeking to challenge order dated 08.05.2007 passed by learned Addl. District & Sessions Judge (Fast Track) No.1, Bhilwara in Sessions Case No.7/2007 whereby the learned trial Judge rejected application moved under Section 319, Cr.P.C. by the petitioner. The petitioner complainant has prayed that the said application may be allowed and non-petitioners No.2 to 3 may be added as accused in the trial.

According to facts of the case, upon complaint filed by the petitioner on 21.12.2006 with regard to allegation that when the complainant was coming from agricultural field to her house alongwith Kalyan and Bheru, accused Ramdhan and Sanwara hit her with their bicycle as a result of which she received injury on her knee and fell down.

The complainant petitioner alleged that thereafter Ramchan, Nemichand, Sukkha, Mahaveer and Sanwra assaulted her and they also belaboured Bheru and Kalyan. According to the petitioner, the assailants were armed with lathies and axe. Upon the said complaint, FIR was registered and injured complainant and Bheru were medically examined. After investigation, the police however filed challan in the Court only against two persons viz., Nemi Chand and Ramdhan and remaining three persons though they were named in the FIR were not charge-sheeted by the police.

After recording statements of the prosecution witnesses, the complainant moved application for adding non-petitioners Sukkha, Sanwara and Mahaveer as accused because there was sufficient evidence against them in the statements of the prosecution witnesses recorded by the trial Court and, so also, their names were specifically mentioned in the FIR while assigning their role in the incident. The application filed by the complainant-petitioner was opposed before the trial Court. After hearing arguments upon the complainant's application, the learned trial Court vide the impugned order rejected the application moved under Section 319, Cr.P.C.

Learned counsel for the petitioner vehemently argued that rejection of the application filed under Section 319, Cr.P.C. by the trial Court is contrary to the evidence coming on record and, therefore, illegal. It is urged that according to the evidence recorded by the trial Court, P.W.-1 Smt. Manju, P.W.-2 Kalyan, P.W.-5 Bheru (injured), P.W.-6 Rameshwar

and P.W.-8 Hajari, all these witnesses have testified to the specific allegation and role assigned to the non-petitioners in their involvement in the incident and having participated in the assault. Learned counsel for the petitioner contended that this important aspect of the evidence coming on record has not been considered by the trial Court and, rather, the trial Court has adjudicated upon the allegations while deciding the application under Section 319, Cr.P.C., as it were, the trial Court was finally deciding the case against them. It is argued by learned counsel for the petitioner that the trial Court has, vide the impugned order, recorded finding upon the involvement of the non-petitioners No.2 to 3 which is not permissible under law and the application filed by the petitioner under Section 319, Cr.P.C. is illegally rejected. It is argued that the trial Court was only under obligation to see that there is evidence on record to take action against the persons sought to be arrayed as accused in the trial; but, the learned trial Court has adjudicated upon the matter as if the matter was being finally decided against them. It is further submitted by learned counsel for the petitioner that on the basis of sufficient evidence having come on record, it was the duty of the trial Court to array the non-petitioners Sukkha, Sanwara and Mahaveer as accused in this case.

Per contra, learned counsel for non-petitioners No.2 to 3 vehemently argued that at the time of deciding application under Section 319, Cr.P.C. the Court is required to consider whether on the basis of the evidence on record conviction is possible. It is argued that application cannot be decided merely on the basis of the presence of the persons

sought to be added as accused and there must be cogent and sufficient evidence on record which shows that ultimately conviction is possible in the matter, therefore, the learned trial Court has rightly rejected the application which does not warrant any interference by this Court.

It is true that as per the judgment of the Hon'ble Supreme Court in Michael Machado & Another Vs. Central Bureau of Investigation & Another, reported in (2000) 3 SCC 262, before the Court exercises the power conferred under Section 319 Cr.p.C. the Court is required to satisfy that there is a reasonable prospect of the case as against the person sought to be arraigned as accused ending in conviction for the offence concerned. For the said purpose, at the time of passing orders under Section 319, Cr.P.C. the trial Court is required to see the material on record keeping in mind the ultimate prospects of conviction of such accused. Having so appreciated the material on record, if the Court cannot arrive at a positive conclusion as to such prospects of conviction of the person so sought to be implicated for trial, the Court is not required to array such person as accused in the trial. Since the Court exercises discretion under Section 319, Cr.P.C. during the course of the trial, such stage is only after commencement of the evidence in the trial. Therefore, it is essential for the trial Court to ascertain at the time of exercising jurisdiction under Section 319 of the Code that there is evidence disclosing commission of the offence by the person sought to be arrayed as accused to stand trial together with the accused already before the Court.

In **Lok Ram Vs. Nihal Singh & Another, (2006) 3 SCC (Cri) 532**, the apex Court held that the word "evidence" in Section 319 Cr.P.C. contemplates the evidence of witnesses given in Court. The trial Court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

At the time of deciding application under Section 319, Cr.P.C. the court is under obligation to consider the evidence which is on record, more specifically statements of the prosecution witnesses and to decide whether any other person is required to be arrayed as accused. In **Rukhsana Khatoon (Smt.) Vs. Sakhawat Hussain & Others, 2004 SCC (Cri) 1153**, the import of evidence of the prosecution witnesses corroborating the alleged role of the person sought to be arrayed as accused is held to be sufficient for the Court to exercise discretion under Section 319, Cr.P.C.

It is also required to be observed that application filed under Section 319, Cr.P.C. is required to be decided independently without even notice to such person against whom application has been filed for taking cognizance because at that stage the evidence means the evidence collected before the Court upon examination of the prosecution witnesses. It appears from the perusal of the impugned order that the learned trial Court has written down the verdict which is illegal and contrary to the settled principles of law. The Court is, at that stage, only required to

conclude prima facie on the basis of the evidence produced by the prosecution before it whether power under Section 319, Cr.P.C. is to be exercised or not. Section 319 of the Code of Criminal Procedure does not contemplate a close and deeper appreciation of the evidence so as to adjudicate upon the question of guilt finally.

Thus the “evidence” for exercise of power under Section 319, Cr.P.C. is the evidence which causes the Court's judicial mind to perceive that it appears from the evidence that person not arraigned before it is involved in the commission of the crime and, therefore, the Court for the purpose of Section 319, Cr.P.C. is only required to prima facie conclude that such person could be tried together with the accused for having committed the offence. Obviously the trial Court has not considered the application under Section 319, Cr.P.C. within correct parameters and committed grave error and illegality while deciding the application.

From careful perusal of the impugned order, it is obvious that the trial Court has sifted the evidence to adjudicate upon the question of guilt of the non-petitioner.

In the present case, P.W.-1 Smt. Manju has categorically stated in her statement before the Court that, “रामधन व सांवरा ने मेरे साइकल की टक्कर की मारी जिससे मेरे कोहजनी पर लगी व मैं नीचे गिर गई। फिर मैं नीचे गिर पडी व भैरू व कल्याण को रामधन व नेमीचंद सुक्खा, महावीर व सांवरा मारने लगे।"

In the statement of P.W.-2 Kalyan, he has categorically stated that,

“मारपीट में सांवरा भी था महावीर भी था व सुक्खा भी था जिनको मैं जानता हूँ।" and no cross-examination with regard to this assertion was made by the defence.

Likewise, in the statement of P.W.-5 Bheru (injured), he has categorically stated in his cross-examination that, “महावीर, सुक्खा व सांवरा ने भी मेरे साथ मारपीट की। मेरे स्कुल के पास रामधन ने मेरे पांव पर कुल्हाडी की दी। सांवरे से पहले नेमीचंद ने हाथ पर मारी। सांवरे ने मेरे शरीर पर मारी। सुक्खा ने मेरे बायें पांव पर मारी। सांवरे ने मेरे बायें हाथ के कोहनी पे मारी।"

Similarly, P.W.-6 Rameshwar has stated in his statement that, “इनके साथ महावीर, सुक्खा व सांवरा भी कूट रहे थे।" In cross-examination, it is specifically stated by him that, “महावीर भेरू को कूट रहा फिर कहा पांचो जने भेरू को कूट रहे थे।"

In his statement, P.W.-8 Hajari specifically stated that, “इनके साथ एक और महावीर, सावर, सुखदेव थे महावीर के हाथ में लकडी सावर के हाथ में सरिया था।"

Considering the statements of the prosecution witnesses in the light of the discussion made hereinabove, it is abundantly clear that there is sufficient evidence for arraying the non-petitioners as accused in the trial. The learned trial Court sidetracked while taking into account statements of the witnesses and wrongly sifting the evidence to grope for guilt or innocence of the non-petitioners which is not permissible under law. It may be observed that none of the prosecution witnesses has been declared hostile by the prosecution.

Before the learned trial Court, there was sufficient material on record in the statements of the prosecution witnesses to implicate the non-petitioners No.2 to 3 and the trial Court, at that stage, was required only to take into account the evidence to sufficiently show the involvement of the persons sought to be added as accused. defence of the non-petitioner which could not be considered before taking cognizance of the offence against that person. Upon perusal of the impugned order it is clear that the trial Court has decided the case as if it reached conclusion as to the innocence of the non-petitioners.

Consequently, the revision petition is accepted. The impugned order dated 08.05.2007 passed by the trial Court is set aside. Application filed by the complainant petitioner under Section 319, Cr.P.C. is ordered to be allowed. The trial Court is directed to take cognizance of offence against non-petitioners No.2 and 3 and their presence shall be secured through issuing bailable warrants against each of them for a sum of Rs.5,000/-. After securing their presence, the trial Court shall proceed accordingly with the trial in accordance with law.

(Gopal Krishan Vyas) J.